IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 1288

TEX TAN WELHAUSEN COMPANY AND
TEX TAN WESTERN LEATHER COMPANY, DIVISION
OF TANDY CORPORATION,

Petitioner

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Supplement to Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This supplement to the Petition for Writ of Certiorari, which was filed herein on March 6, 1970, is filed to call attention to the conflict between the Board Order and the Court's Decision here and *H K. Porter Co., Inc. v. National Labor Relations Board*, decided by this court on March 2, 1970.

Justice Black in delivering the Opinion of the Court states that the parties in *Porter* were agreed that "this is the first time in the 35-year history of the Act that the Board has ordered either an employer or a union to agree to a substantive term of

a collective bargaining agreement." The parties were mistaken: the Board decision in *Porter* was handed down on July 3, 1968. Two days before, on July 1, 1968, the Board handed down its decision in *Tex Tan*, in which, as pointed out in the Petition, it ordered Tex Tan to agree to several substantive provisions of a collective bargaining agreement. Two of the same members of the Board, including the chairman, who decided *Tex Tan* also decided *Porter* two days later.

Without looking at anything else in the record, *the court need only to refer to pp. A166 and A167 of the Appendix* to the Petition to see that the Board ordered the Company to make five specific changes in its contract proposal. The Board imposed its own views as to what the contract should include in five specific particulars. According to *Porter*, the Board had no lawful authority to enter such an order.

In addition, the Board order retroactively re-writes the contract of the parties with reference to vacations and eliminates Section 10 of Article VI which provided that if an employee was absent from work for more than 280 hours in a vacation year, he lost his vacation (pp. A169-170) The Board order requires the Company to make a concession (elimination of Section 10 of Article VI) which the Union sought unsuccessfully to obtain in the negotiations.

The arbitrariness of the Board's action in requiring Tex Tan to give vacations contrary to its contract with the Union and contrary to established Board policy is underlined by the Board's decision in *Roegelein Provision Company*, 181 NLRB No. 72, handed down after a hearing before the *full Board* on *March 6, 1970*. *Roegelein* involved a contractual provision substantially identical with that in *Tex Tan* (drawn by the same lawyers), except that the disqualifying number of hours in *Roggelein* was 200 instead of the 280 in *Tex Tan*. The Board (with Member Brown dissenting) held that Roegelein did not act illegally in denying vacations to strikers who were absent more than 200 hours. Again, the Board reaffirmed its long

standing *General Electric* rule. In excluding strike time in determining eligibility for vacations, General Electric, Kimberly-Clark, Mooney Aircraft, Ace Tank, Illinois Bell, Roegelein and Tex Tan took substantially identical action. What each of the companies did was held legal, save and except Tex Tan only. What was proper when done by other employers, was unlawful when done by Tex Tan, according to the Board.

Returning to *Porter*, the Board sought to justify its action in writing a contract for the parties on the ground that the Company had repeatedly violated the Act in general and Section 8(a)(5) in particular. Tex Tan has no such record. In an earlier Tex Tan case, the Board stated that there was no evidence "of any union animus on the part of Respondent," 150 NLRB 1613. *Tex Tan has never been finally found guilty of an unfair labor practice.* The justification which the Board sought to use in *Porter*, is not present here.

In *Porter*, the unauthorized action which the Board sought to take stood out stark and bare. Here, an effort is made to obscure the illegal action in a plethora of irrelevant words. The Board action taken is exactly the same: the Company is ordered to make substantive changes in its contract proposal. In *Porter*, one such concession is ordered. Here, at least six concessions to the Union are ordered. The order here attacked flouts the freedom of contract which, according to *Porter*, is the fundamental principle upon which the Act is grounded. The order here, if enforced, would make a mockery of the idea that the parties are free to negotiate their own contract without governmental interference.

Respectfully submitted,

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March, 1970

Certificate of Service

A true copy of the foregoing supplement has been forwarded by certified air mail to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Penn 17 Building, Washington, D. C., and to I. N. D. Wells, Jr., 1601 National Bankers Life Building, Dallas, Texas, Attorney for Intervenor, on this 12th day of March, 1970.

Theo F. Weiss